No. 18-4260

In the
United States Court of Appeals
for the Sixth Circuit

JAMES C. DIMORA,

Petitioner - Appellant,

v.

UNITED STATES OF AMERICA,

Defendant - Appellee.

Appeal of Judgment of United States District Court
for the Northern District of Ohio

APPELLANT JAMES C. DIMORA'S BRIEF

David E. Mills (OH 0075400)
THE MILLS LAW OFFICE LLC
1300 West Ninth Street, Suite 636
Cleveland, OH 44113
Tel. (216) 929-4747
Fax. (202) 379-1767
dm@MillsFederalAppeals.com

Philip S. Kushner (OH 0043858)
KUSHNER & HAMED CO., L.P.A.
One Cleveland Center
1375 East Ninth Street, Suite 1930
Cleveland, OH 44113
Tel. (216) 696-6700
Fax. (216) 696-6772
pkushner@kushnerhamed.com

Counsel for James C. Dimora

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

James Dimora requests oral argument under Federal Rule of Appellate Procedure 34(a)(1) and Sixth Circuit Rule 34(a). Oral argument will assist this Court as it assesses whether cumulative error enabled the jury to convict Dimora of lawful conduct and without properly determining if he had criminal intent.

INTRODUCTION

James Dimora was one of three County Commissioners in Cuyahoga County, Ohio, and he was also Chair of the County Democratic Party. Over the years he received many things of value (gifts, meals, trips, etc.), as many politicians do, from constituents and friends who sought greater access to him and his influence. He did not hide this—he disclosed it on his state ethics reports each year. But the Government charged him with various bribery-related crimes, contending that he had criminal intent to secretly obtain things of value in return for actions as Commissioner. In reliance on the district court's pre-trial ruling that the ethics reports were admissible evidence, Dimora's counsel told the jury in opening statements that his ethics reports would show that he disclosed the things of value received and therefore did not act with criminal intent. But when it came time to show the jury the reports, the Government persuaded the court to exclude them as hearsay. The Government further told the jury, consistent with the jury instructions, that *anything* Dimora did as Commissioner qualified as an "official act" under the bribery laws. Not surprisingly, the jury convicted him.

On appeal, this Court held that excluding the ethics reports was error, but the Court split 2-1 regarding whether the error was harmless. In dissent, Judge Merritt explained that this error required vacating Dimora's convictions because,

had it not occurred, the jury could have concluded that Dimora lacked criminal intent and was not guilty. But the majority held that the error was harmless, stating that there was overwhelming evidence about the alleged *quid pro quo* arrangements—accepting money or other things of value in exchange for "official acts."

Yet after Dimora's convictions were affirmed, the Supreme Court held in *McDonnell v. United States* that the similarly overbroad definition of "official acts" as used in Dimora's case erroneously allows jurors to convict for lawful conduct, such as merely making phone calls, arranging meetings, and the like. That is the same sort of evidence the Government told the jury was sufficient to convict Dimora. And the majority on direct appeal relied on that same overbroad definition when concluding that the evidence of "official acts" presented to the jury was sufficient to make the error in excluding the ethics reports harmless.

These errors, considered together, thus enabled the jury to convict Dimora without determining if he had criminal intent on either end of the alleged "arrangements"—whether he intended to secretly obtain things of value in return for acts as Commissioner. This is true even if there is other evidence of actual official acts he did perform—the irrefutable point is that the jury was able to convict Dimora based on nothing more than Dimora making phone calls and

arranging meetings, so the jury never had to consider other evidence and grapple with whether it established guilt. In short, the jury was able to convict Dimora of lawful conduct and stop its deliberations there.

After *McDonnell* was decided, Dimora moved the district court to vacate his convictions under § 2255 in light of these cumulative errors. The district court denied the motion and denied a Certificate of Appealability. But this Court granted a COA, recognizing that reasonable jurists could debate the key questions presented, including whether cumulative error had a substantial influence on the verdict. Because that is indeed the effect the errors had, this Court should vacate Dimora's convictions and remand for a trial. The instructional error invalidates all the bribery convictions, especially when combined with the ethics-report error that prevented the jury from assessing criminal intent. These errors also invalidate all convictions on the remaining counts, because they relate to the bribery convictions and similarly require a proper finding of criminal intent that never occurred.

Dimora was sentenced to 28 years in prison—effectively a life sentence. He and his family are entitled to a trial that satisfies the minimum requirements of fairness and due process, not one where a jury is instructed that it can convict for conduct that is not criminal and where key evidence regarding criminal intent is promised but then excluded. A new trial is required.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 2255. This Court has jurisdiction under 28 U.S.C. § 1291 because the district court's October 22, 2018 decision is a final order. (R. 1197, PageID#33196.) A timely notice of appeal was filed on December 19, 2018. (R. 1200, PageID#33204.)

STATEMENT OF THE ISSUES

1. **Exclusion of Ethics Reports.** Dimora's ethics reports rebut the Government's claims that he "secretly" obtained things of value—the reports list that he received things of value and who provided them. This Court has already concluded that the district court's exclusion of Dimora's ethics reports as hearsay was error. After trial, and despite the Government never making the argument, the district court also stated that the exclusion of the reports was justified by Rule 403, which allows exclusion of evidence when its probative value is substantially outweighed by its unfairly prejudicial effect. These reports were at the heart of Dimora's defense, were promised to the jury in opening statements, and are not complex or confusing. Does the district court's sua sponte post-trial invocation of Rule 403 justify their exclusion?

2. **"Official Acts" Instructions.** The jury instructions told the jury—and the Government repeatedly stated—that *any* acts Dimora took in his role as Commissioner amounted to "official acts" sufficient for federal bribery convictions, including merely arranging meetings. But the Supreme Court recently held in *McDonnell v. United States* that this is an overly broad definition

and that "official acts" require more, such as formal decisions on pending matters. Were the jury instructions erroneous under *McDonnell*?

3. **Harmless Error—Cumulative Effect.** The Government's case was that Dimora had criminal intent to secretly receive things of value and to provide actions as Commissioner in return. Dimora's ethics reports would have rebutted the alleged "secrecy," and this Court previously split 2-1 on whether the error in excluding them was harmless. But now we know, under *McDonnell*, that many of the "official acts" the Government told the jury were part of these alleged secret schemes were not official acts at all. This means that—regardless of any other evidence marshaled against Dimora—the jury was told that it could convict based on actions that are not criminal. Thus, both aspects of the Government's case against Dimora were presented to the jury in error. As to the ethics-report exclusion alone, Judge Merritt concluded Dimora's convictions should be vacated, and the majority found harmless error based on evidence falling under the overbroad definition of "official acts." Did the two errors, when considered together, have a substantial and injurious effect on the jury's decision to convict, such that Dimora is entitled to a new trial?

STATEMENT OF THE CASE

I. Background

The influence of money in politics is not unique to this case—the receipt of things of value and campaign donations is an aspect of every politicians' career. "Money in politics may at times seem repugnant to some," but the Supreme Court has explained that "government regulation may not target the general gratitude a candidate may feel toward those who support him or his allies, or the political access such support may afford." *McCutcheon v. FEC*, 134 S. Ct. 1434, 1441 (2014). Simply put, "[i]ngratiation and access . . . are not corruption." *Id.* (quoting *Citizens United v. FEC*, 558 U.S. 310, 360 (2010)).

For a concrete example of this reality, consider former Virginia Governor Robert McDonnell—the protagonist in the Supreme Court's *McDonnell* decision. 136 S. Ct. 2355 (2016). One of his constituents was the CEO of a company that developed a nutritional supplement, and the CEO hoped that McDonnell would influence the state universities to conduct the research studies necessary for FDA approval before it could be sold. The CEO first met McDonnell after he offered McDonnell a ride on his private jet to assist with his election campaign. Once McDonnell was elected, the CEO continued to seek his help in getting the supplement to market. The CEO again took McDonnell on his private jet; took

McDonnell's wife on a shopping spree and bought her $20,000 in designer clothing; hosted McDonnell's family at his vacation home where McDonnell borrowed the CEO's Ferrari; bought a Rolex for Mrs. McDonnell to give as a gift to McDonnell; gave $50,000 as a loan to the McDonnells; later gave $20,000 as another loan to them; paid for several rounds of golf for McDonnell and his children; and gave $10,000 as a wedding gift to McDonnell's daughter. In total, the CEO gave the McDonnells over $175,000 in gifts and loans.

During this time, McDonnell agreed to introduce the CEO to the State's Secretary of Health and Human Resources; provided the Secretary with the CEO's proposed research protocol for the supplement; requested that the Secretary send an aide to a meeting with the CEO and Mrs. McDonnell to discuss the research studies; and hosted an event at the Governor's Mansion for the CEO and researchers at state universities where the CEO distributed free samples of the supplement and handed out eight $25,000 checks that researchers could use in preparing grant proposals for studying the supplement. At this event, McDonnell asked the researchers whether they thought there was some scientific validity to the supplement and whether there was reason to explore it further. McDonnell also met with the state's Secretary of Administration and head of the Department of

Human Resource Management and suggested to them that the supplement should be covered by the health plan for state employees.

People might say this conduct was unseemly; perhaps they would say McDonnell should have been voted out of office. Others might say this is simply an example of how money and politics intertwine, and that it is not grounds for voting an official out of office. Either way, that doesn't mean the conduct was criminal. *Id.* at 2375.

Dimora also received things of value. He also took actions as Commissioner that benefited those who sought his access and influence. The question for the jury was whether he acted with criminal intent and committed criminal conduct.

Until his convictions in this case, James Dimora had no criminal history of any kind. "Jimmy," as he's known, began his career in public service as a young man in the 1970s working at the waste-water treatment plant in Bedford Heights, Ohio. (R. 940, Sent. Mem. at 26, PageID#18991.) One day he raised concerns about the lack of lighting at the plant at night, and was told that if he was so bothered maybe he should run for City Council. So that's what he did. He served on the Council for four years, and then was elected Mayor in 1981. His service and dedication to the citizens of Bedford Heights was remarkable, and he was re-elected to four consecutive terms, serving from 1982 to 1998. (*Id.* at 27, PageID#18992.)

During this time, Dimora became a husband and father. He married Lori Bissler in 1980 and they had three children: Anthony, Joe, and Lisa. (PSR (sealed) ¶ 129.) Dimora's wife describes him as a "kind, generous, loving, and passionate person" who "will be there to help anyone who asks . . . ." (*Id.* ¶ 130.) Anthony says that Dimora "is 'the best' father a person could have." (*Id.* ¶ 131.)

After his final term as the Mayor of Bedford Heights ended in 1998, Dimora became one of the three Commissioners on Cuyahoga County's Board of Commissioners. Cuyahoga County covers various municipalities (including Cleveland), and the Board of Commissioners acted as the head of the County Government. Dimora also served as Chair of the Cuyahoga County Democratic Party.

As a County Commissioner and Chair of the Democratic Party, Dimora helped constituents wherever he could. He had influence that others did not, and people knew that he might be able to help them by setting up a key meeting with another official, reaching out to a senator for help with an immigration issue, recommending someone for a job, navigating the contractor bid process to secure a County project, calling staff to look into grant funding on projects, inquiring about the status of bids, writing letters of recommendation, directing staff to set up various meetings with businesspeople, and so on.

Accordingly, as with any powerful politician, people sought access to Dimora and to his influence. This ingratiation, of course, means that politicians like Dimora will be treated to gifts and things of value by constituents who want to foster a closer relationship, often with the hope that the politician could provide some benefit down the road. As one contractor explained, Dimora "was a friend and political official, and I figured if I could help him, I'm sure he could help me." (R. 1037, Tr. Vol. 24 at 5739, PageID#28331.) So people treated Dimora whenever they could. He loved a good steak dinner. His friends, including people who did significant business with the County, knew this and would always pick up the bill—as one friend explained, Jimmy "never" paid. (R. 1024, Tr. Vol. 15 at 3855, PageID#25751.) He was even treated to a trip to Las Vegas. But Dimora's favorite place was actually his own backyard. That's where he could entertain family and friends, so he especially enjoyed when the things of value he received were in the form of improvements his contractor friends could readily provide to the physical space, like nice outdoor countertops and an outdoor bathroom.

The State of Ohio has long recognized this reality of ingratiation with public officials. By law, state officials are required annually to complete a form filed with the State of Ohio Ethics Commission that discloses all such things of value over $75 received, along with who provided it. State officials can receive things of value

(such as meals, expensive trips, and the like), but they must disclose these relationships on the ethics report so that it is transparent to the public.

Dimora did just that, filing the ethics reports each year. He didn't hide his relationships; this world of ingratiation was no secret. On the reports, Dimora listed the dozens of people who gave him these things of value each year. For example, in his 2007 ethics report, he identified 55 people who gave him things of value worth more than $75. An image of this list, publicly filed with the Ohio Ethics Commission, is reproduced on the next page.

OHIO ETHICS COMMISSION
FINANCIAL DISCLOSURE STATEMENT FOR CALENDAR YEAR 2007

JAMES C. (JIMMY) DIMORA-QUESTION #2. GIFTS

1.) Fred LaMalfa
2.) Darlene McCoy
3.) Mort Weisberg
4.) Harlan Diamond
5.) Kenneth Fisher
6.) Robert DiGeronimo
7.) Robert Varley
8.) Richard Jacobs
9.) Sam Miller
10.) Anthony Calabrese, III
11.) Paul Scala
12.) Joseph LaMalfa
13.) Daniel Smith
14.) David Hegedus
15.) Don Shury
16.) Steve Pumper
17.) Pat Gallina
18.) Norman Milstein
19.) Pat Lally
20.) Mike Forlani
21.) Ray Park
22.) Frank Bianchi
23.) Anthony Melaragno
24.) Joel Cole
25.) Frank Todaro
26.) Vincent Russo
27.) Charles Randazzo
28.) Daniel Clark
29.) Tony Mangoni
30.) Umberto Fedeli
31.) Don Elewski
32.) Russell Masetta
33.) Jay Lucarelli
34.) Nick Zavarella
35.) Steven Tomasone
36.) George Exergian
37.) Bridget O'Malley
38.) Joseph O'Malley
39.) Robert Rybak
40.) Ferris Kleem
41.) Norm Casini
42.) Craig Bashien
43.) Robert Peto
44.) Mark Yagour
45.) Rick Capone
46.) Dominic Ozanne
47.) Bill Neiheiser
48.) Allen L. Haire
49.) Doug Bennett
50.) Joseph Vinciguerra
51.) Michael Gabor
52.) John Valentine
53.) John Sideras
54.) Bill Donnelly
55.) Michael Smith

(R. 940-2, Ethics Reports at Ex. F-000151, PageID#19169.) In this submission, Dimora also separately identified 24 people who paid for food and drink. (*Id.* at Ex. F-000152, PageID#19170.) He made similar disclosures in his ethics reports every year. (*Id.* at Ex. F-00001–000207, PageID#19019–19225.)

Of the dozens of people Dimora identified in his ethics reports, there were two he admittedly left off that technically fell within its terms—but that's just because the "things of value" received from them implicated infidelity. The first was Gina Coppers, with whom he allegedly had a relationship. The second was Kevin Payne, who provided access to a condo. Aside from these two, the people who provided things of value to Dimora were all identified by Dimora in his publicly filed ethics report every year, as required by law.

Moreover, Dimora never promised anyone that he would perform an official act in exchange for a thing of value, and nobody ever told him they were giving him a thing of value in exchange for an official act. Indeed, the official decisions by the three commissioners were typically uncontroversial, unanimous (Dimora was one of three votes), and came before them by staff recommendation. And Dimora frequently told contractors who had given him things of value and then sought to be hired by the County for various construction projects that he hoped they would be the low bidder so that they would get the work. (*See, e.g.*, Ex. 400-NN ("Well, I'm

gonna keep my fingers crossed for you.") (recording); Ex. 1407 ("Good, I hope you are the low.") (recording).) Moreover, many of Dimora's conversations with various officials, judges, and employees occurred in his role as Chair of the Democratic Party.

In contrast to Dimora, another powerful county official—County Auditor Frank Russo—received similar gifts from constituents during this time but did not disclose those relationships on ethics reports. Unlike Dimora, Russo kept the gifts and relationships secret.

In 2007, the FBI launched a massive investigation of public corruption in Cuyahoga County. Employing wiretaps, the Government secretly recorded 44,000 phone calls totaling 1,589 hours. (R. 328 at 3–4, PageID#3053–54.) In none of these calls did Dimora ever say he would perform an official act in exchange for a thing of value, and nobody ever told him they were giving him anything in exchange for an official act. Nonetheless, the Government brought public-corruption charges against Dimora along with many other County employees and officials, including Russo.

II. Procedural History

A. District Court

1. The Indictment

On September 14, 2010, a federal grand jury returned a 31-count indictment against Dimora and five others. (R. 1, PageID#1.) A Third Superseding Indictment—the operative indictment here—was returned on September 7, 2011. (R. 444, PageID#9630.) That indictment named Dimora and a former employee in the Auditor's office, Michael Gabor, as the defendants and contained 37 counts. Dimora was charged in 34 counts.

The indictment centered on the Government's allegation that Dimora had exchanged "official acts" as Commissioner in return for gifts received, i.e., that he committed bribery.

The bribery counts made up 26 of the 34 counts against him:

- **Hobbs Act**, 18 U.S.C. § 1951, which prohibits obtaining property by extortion under color of official right (9 counts plus 8 conspiracy counts);

- **honest services mail and wire fraud**, 18 U.S.C. §§ 1341, 1346, and 1349, which prohibit schemes to deprive another of the intangible right of honest services (3 conspiracy counts); and

- **bribery concerning programs receiving federal funds**, 18 U.S.C. §§ 371 and 666 (4 counts plus 2 conspiracy counts).

The remaining 8 counts were related to the bribery counts:

- **tax fraud**, 26 U.S.C. § 7206(1), based on the allegation that if Dimora received bribes in exchange for his official acts, they constitute income that is taxable (4 counts);

- **RICO**, 18 U.S.C. § 1962(d), based on the allegation that bribery and crimes alleged constituted a pattern of racketeering activity (1 count);

- **traditional mail fraud**, 18 U.S.C. § 1341, based on the allegation that Dimora's receipt of bribes involved obtaining things of value while failing to disclose material facts (1 count, plus overlap with the honest-services conspiracy counts above); and

- **obstruction**, 18 U.S.C. §§ 371, 1512(b), and 1519, based on the allegation that Dimora accepted bribes and then attempted to cover them up (2 counts).

2. The Ethics Reports

The indictment laid out the Government's allegations that Dimora engaged in secret schemes to obtain things of value in return for his acts as Commissioner. The Government alleged that nine people, besides Copper and Payne, gave such things of value to Dimora. For all nine, Dimora disclosed on the ethics reports his receipt of things of value from each of them in every year for which the Government charged him, plus additional years. This is summarized in the following table:

Dimora's Publicly Filed Ethics Reports 2000–2010
Summary of Relevant People Identified

Person Dimora identified	Years Dimora disclosed receiving gifts over $75 from that person	Years Dimora disclosed receiving food or drink from that person
1. Kevin Kelley	2008	2004–08
2. Ferris Kleem	2006–08	2005–08
3. John Valentin	2006–07	none
4. Nick Zavarella	2000–02; 2004–07; 2009	2008–09
5. William Neiheiser	2000–01; 2006–08	2006
6. Steven Pumper	2001–09	2001–08
7. Anthony Melaragno	2002–07	none
8. Robert Rybak	2004–08	2008
9. Charles Randazzo	2003–07	2002–2010

(R. 940-2, Ethics Reports at 58, 71–73, 86–87, 97–98, 108–09, 121–22, 135–37, 151–52, 168–69, 187, 189, 202, PageID#19076, 19089–91, 19104–05, 19115–16, 19126–27, 19139–40, 19153–55, 19169–70, 19186–87, 19205, 19207, 19220.) Indeed, when you look at the image from Dimora's 2007 report reproduced in this Brief on Page 13, you see nearly all of these names in that one disclosure alone.

The Government was determined not to let the jury see these disclosures. The Government moved in limine to exclude all of Dimora's ethics reports from the trial entirely. Yet the district court ruled that Dimora could introduce them to establish lack of criminal intent, so long as he did so during the presentation of the defense case and not through Government witnesses. (R. 1010, Tr. Vol. 4 at 890–91, 899, PageID#22266–67, 75.) Thus, Dimora's defense centered on rebutting the

Government's allegations that he had secret schemes to enrich himself in return for actions as Commissioner. The ethics reports would show the jury that he wasn't hiding the relationships or the things of value he received, which would show that he lacked criminal intent.

3. Trial

In its opening statement, the Government described the front end of the alleged arrangements—allegations of Dimora and Russo secretly obtaining things of value. The Government emphasized Dimora and Russo dealt only with people who will "keep the secret . . . ." (*Id.* at 925, PageID#22299.) This, the Government said, was "[r]ule number one." (*Id.*) The Government further remarked that "for years the door to this dark and secret world was shut and locked and bolted, and no one could get in unless they let them in." (*Id.* at 928, PageID#22302.) The Government also described what it viewed as the back end of these arrangements—Dimora and Russo selling "official acts" in return. (*Id.* at 978, PageID#22352.) The Government said that "official acts" are "essentially the power and authority and influence that Dimora had because he's a commissioner . . . ." (*Id.*)

In Dimora's opening statement, he set out to rebut these two main points. First, counsel told the jury that there weren't secret relationships and

arrangements, as the ethics reports would show: "And you will see, ladies and gentlemen, and the evidence will show that there was no attempt to hide this. These reports, these state ethics reports, are required to be filed by all public officials." (*Id.* at 1005–06, PageID#22379–80.) Second, counsel told the jury that "[t]he evidence will show that no official acts by Jimmy Dimora were paid for." (*Id.* at 1029, PageID#22403.)

The Government then began its case in chief. Its star witness was Auditor Frank Russo—the man who, like Dimora, had also received the dinners and additional things of value. But unlike Dimora, Russo had never disclosed receiving things of value in his state ethics reports. Russo had struck a deal and pleaded guilty, agreeing to testify against Dimora in the hope of leniency.

For each alleged scheme, Government repeatedly elicited testimony—at least 60 times, through 20 different witnesses—that Dimora did not disclose that he received things of value. (*See*, *e.g.*, R. 1027, Tr. Vol. 19 at 4759, PageID#26680 ("Was it ever disclosed in public, to your knowledge, that the union was sponsoring dinner and drinks for Commissioner Dimora and others?"); *see also* Dimora's 3/30/2013 Brief on Direct Appeal, at 57–63 (Summary Chart of Nondisclosure Questions).) And, as for the "official acts" purportedly making up the back end of the alleged arrangements, the Government elicited testimony

regarding many acts Dimora took that benefited those who gave him the allegedly "secret" things of value. These acts included arranging phone calls and meetings, writing recommendation letters, and the like.

Dimora then had his opportunity to present his case, where he would finally introduce the state ethics reports he had promised the jury during opening statements. This would also distinguish him from Russo, who did indeed act in secrecy and never made any disclosures on his ethics reports. But the Government objected, contending that the reports were hearsay. (R. 1029, Tr. Vol. 31 at 7373–74, PageID#26965–66.) Dimora explained that the reports were not being offered for the truth of the matters asserted (that he received the things of value from the people listed); they were instead being offered for the simple fact that he disclosed the relationships and things of value received—they weren't secret. (*Id.*) The district court nonetheless ruled that the reports were inadmissible hearsay, further remarking that they would be "very confusing" to the jury. (R. 1030, Tr. Vol. 32 at 77574–77, PageID#27166–69.) Dimora's entire defense regarding his lack of criminal intent and lack of acting in "secret"—which the district court had earlier assured him could be presented to the jury—was suddenly eliminated.

In its closing argument, the Government emphasized its two main points. First, it told the jury to infer criminal intent from the alleged "secret" receipt of

things of value. The Government said that when something of value is received as a bribe, "there sure is a need to cover your tracks, to cover up the connection, to cover up the bribe." (R. 1045, Tr. Vol. 36 at 7981, PageID#30137; *see also* R. 1046, Tr. Vol. 37 at 8328, PageID #30484 ("[P]eople who are taking bribes, accepting bribes, selling, cashing in the power of their public offices, those people need to keep that a secret.").) Second, the Government repeatedly told the jury that anything Dimora did because he was a Commissioner was automatically an official act: "Anything commissioners do because they're a commissioner. . . . Because he's a commissioner, he can do those things. Those are official acts." (R. 1046, Tr. Vol. 37 at 8314, PageID#30470; *see also id.* at 8317, PageID#30473 ("It's anything a commissioner can do.").)

For his closing, Dimora was left facing the jurors unable to fulfill the promise from opening statement that they would see his ethics reports showing his disclosures and negating his criminal intent to establish "secret" arrangements. As for official acts, counsel attempted to argue that "official acts" do not so broadly encompass "anything" a commissioner does, but rather are confined to acts such as voting, which are more formal than merely setting up meetings, making phone calls, and writing letters. But this effort was of little relevance because the jury

instructions told the jury, as the Government insisted, that anything Dimora did as Commissioner was an "official act."

Indeed, the court included two jury instructions, over defense objection, that expanded the statutory definition of "official act" found in the federal bribery statute, 18 U.S.C. § 201(a)(3). The statutory definition, which was given to the jury, is as follows: "The term 'official act' includes any decision or action on any question, matter, cause, suit, proceeding, or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit." (R. 735-1, Jury Instr. at 23–24, PageID#16988–89.) The court's additional instructions expanded the definition of official acts to include "decisions or actions *generally expected* of the public official" as well as "*informal* official influence." (*Id.* at 24, PageID#16989 (emphases added).) The instructions further reinforced that the line between official and non-official acts is the line between acts done in an *official* capacity versus acts done in a *personal* capacity, stating that "official acts" do not include "actions taken in a personal or non-official capacity." (*Id.*) The instructions also told the jury that the nature of the official acts can bear on criminal intent: "[Y]ou may consider the official action's lawfulness, desirability, or benefit to the public welfare, just as you would any other circumstances in the case, as it

may bear upon *the intent of the defendant in accepting the thing of value.*" (*Id.* at 23, PageID#16988 (emphasis added).) The jury was told to apply these instructions to all of the federal bribery charges. (*Id.* at 21, PageID#16986.) This is what enabled the Government to argue to the jury that anything Dimora did as Commissioner was an official act, even if it was simply to "have meetings, "direct staff, "write letters," and "take notes." (R. 1046, Tr. Vol. 37 at 8313–14, PageID#30469–70.)

Guided by these instructions, the jury went into deliberations. Without the promised ethics report to assess whether Dimora was really "secretly" obtaining things of value, and following these instructions that "official acts" occurred anytime Dimora did so much as have a meeting or write a letter as Commissioner, the jury unsurprisingly returned a guilty verdict on nearly all counts. (The jury acquitted Dimora on one mail-fraud count).

4. Post-Trial

In post-trial briefing, Dimora argued that the trial was flawed on both essential points (the exclusion of the ethics report and the "official acts" instruction), but to no avail. The district court held to its view that the ethics reports were inadmissible hearsay, even though Dimora again explained that he was not offering them for their truth but simply to show that he had made the disclosures. Moreover—though the Government never raised the point—the

district court further remarked that the ethics reports were inadmissible under Federal Rule of Evidence 403, stating that they had limited probative value, would have "confused" the jury, and were unfairly "prejudicial" to the Government. (R. 930, Op. at 37–43, PageID#18907–13.) As for the argument that "official acts" were defined too broadly, the court concluded that the jury instructions fairly reflected the state of the law. The court did, however, grant a motion for acquittal on one of the Hobbs Act counts. Thus, in the end, Dimora was convicted of 32 counts.

5. Sentencing

At sentencing, counsel emphasized that Dimora had no prior criminal history, and Dimora provided the court with numerous letters from family and community members attesting to both his good deeds throughout his decades of public service and the loving role he played as a father. Counsel further emphasized that Dimora has serious health issues, including chronic pain, hypertension, phlebitis, and an aneurysm. The district court nonetheless sentenced him to 336 months in prison (28 years). In 2012, at 57 years old, he had effectively received a life sentence.

B. Appeal

Dimora appealed, and this Court affirmed in a 2-1 decision. *United States v. Dimora*, 750 F.3d 619 (6th Cir. 2014). Among other arguments, Dimora contended that the district court erred when it excluded the ethics reports as hearsay. This Court unanimously agreed that this was error. *Id.* at 628 (explaining that Dimora "had offered the reports for a non-hearsay purpose" and that the "district court thus erred when it ruled otherwise"). A two-judge majority (Judges Sutton and Griffin) further noted that the district court had also excluded the reports under Rule 403, but the majority stated that it did not need to decide whether that was correct because, in its view, the error was harmless and would not have affected the jury's verdict. *Id.* In support of its view that the error was harmless, the majority stated that "the government produced overwhelming evidence against Dimora," relying on what it believed was overwhelming evidence that Dimora had traded "official acts" for the things of value received. *Id.* at 628–29. As the majority explained, "The relevant crimes required a *quid pro quo* arrangement—accepting things of value in exchange for ***official acts.***" *Id.* at 629 (emphasis added). The majority noted phone calls between Dimora and "alleged bribe-payors," testimony from "bribers" admitting to their "*quid pro quo* arrangements" with Dimora, testimony from Russo who pleaded guilty to charges arising from "similar

arrangements" and "the same arrangements," and circumstantial evidence connecting the "bribes" to the "favors doled out." *Id.* at 628–29. In other words, the majority concluded that evidence of the arrangements, including the requisite "official acts" the jury found, were enough to establish Dimora's criminal intent regardless of the jury never seeing the ethics reports disclosures.

In dissent, Judge Merritt explained why the error was not harmless and why Dimora was entitled to a new trial. *Id.* at 632 (Merritt, J., dissenting). "Subjective intent," he stated, "is the keystone of bribery." *Id.* "The influence of money in politics is growing by leaps and bounds," he continued, "and the subjective intent of the public official receiving the money is perhaps the last and only distinguishing feature between criminal "*quid pro quo* bribery" and permissible "ingratiation." *Id.* "The exchange of money for 'ingratiation and access is not corruption' at all; indeed, the exchange is so essential to the foundation of democracy that it is protected by the *First Amendment*." *Id.* (quoting *McCutcheon v. FEC*, 124 S. Ct. 1434, 1441 (2014)). "We are left to distinguish the two as best we can by looking into the subjective intent of the public official." *Id.* "And by we," Judge Merritt emphasized, "I mean the jury." *Id.*

To the majority's point that the error in excluding the ethics report was harmless, Judge Merritt responded that the majority discounted the effect that the

reports could have had on the jury. *Id.* at 633. The majority was not considering that "the prosecutor promised the jury that she would show a culture of secrecy and nondisclosure shielding Dimora's corruption." *Id.* And the majority was not considering that "Dimora promised, after assurance from the district court that the ethics reports could be admitted, to rebut the government's claim by showing the jury reports disclosing Dimora's relationship with his alleged bribers." *Id.* "These reports, Dimora argued, would show a relationship of 'ingratiation and access' that may have been deplorable but was arguably legal." *Id.* And the Government understood how important these ethics reports were: "The prosecution fought tooth and nail, in sidebar and outside the jury's presence, to keep these ethics reports out of the evidence." *Id.* "These facts do not suggest harmless error," Judge Merritt explained, "but rather an error that could well have influenced the jury's view of the case." *Id.* Judge Merritt thus indicated that all the convictions should be vacated, and a new trial ordered.

Yet the majority was unpersuaded, and the convictions were affirmed. (Dimora had also argued that the "official act" instruction was overbroad, but the panel rejected that argument without discussion.)

Dimora then petitioned the U.S. Supreme Court for a writ of certiorari, which was denied without opinion. *Dimora v. United States*, 135 S. Ct. 223 (2014).

Meanwhile, though, overbroad "official act" instructions were leading to convictions of other public officials, including former Virginia Governor McDonnell. And that case was heading to the Supreme Court, which was poised to impose limits on what amounts to an official act.

C. *McDonnell v. United States*

On June 27, 2016, the Supreme Court decided *McDonnell v. United States*, 136 S. Ct. 2355 (2016). Recall that McDonnell had received over $175,000 in loans, shopping sprees, rounds of golf, a Rolex, and some runs in a Ferrari—all from a CEO seeking McDonnell's help to get his vitamin supplement to market. *Id.* 2361–62. In return, McDonnell set up meetings, called and spoke with other government officials, distributed information, and even hosted an event at the Governor's Mansion where business representatives distributed free samples and eight $25,000 checks that researchers could use to prepare research grant proposals. *Id.* 2361–62. McDonnell and his wife were convicted on multiple conspiracy and substantive counts of honest services fraud and Hobbs Act extortion. *Id.* at 2365, 2366. McDonnell argued that he did not knowingly accept things of value in exchange for official acts because the actions he took were not official acts, and that the district court erred when it defined "official act" broadly in its jury instruction. *Id.* at 2366–67.

The Supreme Court agreed, holding that "official acts" do not simply encompass anything done as an official—the line is not between acts done in an official capacity and those done in a personal capacity. Rather, "official acts" are much more narrowly defined, as they "must involve a formal exercise of governmental power" by the official regarding a pending matter, such as voting on a governmental issue. *Id.* at 2372. By contrast, an act such as "[s]etting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit the definition of 'official act.'" *Id.* Similarly, there is a difference between permissible "expressing support" for something that could benefit a constituent and impermissible "exerting pressure on another official" to that same end. *Id.* at 2371. And the jury must be instructed on the difference between such unofficial and official acts. *Id.* at 2375. The error was not harmless, the Supreme Court explained, because the jury "may have convicted Governor McDonnell for conduct that is not unlawful." *Id.* In other words, there was no way to say the jury disregarded the acts that are not official acts. Accordingly, the Supreme Court vacated McDonnell's convictions. *Id.* The Court further explained that if there was sufficient evidence of proper "official acts" for a jury to convict him, then his case was to be set for a new trial. And if not, the charges must be dismissed. *Id.*

D. § 2255 Motion

In light of *McDonnell*, Dimora filed a motion for relief in the district court under 28 U.S.C. § 2255. He argued that the same sort of instructional error as in *McDonnell* required vacating his convictions. (R. 1162-1, § 2255 Mem., at 1; PageID#32286). He further argued that this instructional error, when combined with the error in excluding the ethics report, resulted in cumulative prejudice. (*Id.* at 2; PageID#32287.) This was especially true, Dimora noted, because the Government had relied on the two errors together to argue that the jury should convict him "based on evidence showing a secret exchange (that was not actually secret) of things of value for official acts (that were not actually official acts)." (*Id.*) This combined effect, Dimora explained, warranted a new trial. (*Id.*)

The district court denied relief. It believed its instructions regarding "official act" were not problematic because the court had further instructed the jury that official acts do not include those done in a personal capacity. (R. 1196, Op. at 24, PageID#33154.) The court also stated that any error on this score was harmless because a rational juror would have "disregarded" those acts that are no longer official acts under *McDonnell*. (*Id.* at 57, PageID#33187.) The court further concluded that any such error was limited to certain counts and that there was no prejudice related to the exclusion of the ethics report. (*Id.* at 58, PageID#33188.)

E. Certificate of Appealability

Dimora sought a certificate of appealability in the district court, contending that, at the very least, he had met the low standard of establishing that reasonable jurists could debate these issues. The district court refused to grant a COA on any issue. (R. 1199, Order, PageID#33201.)

Dimora then sought a COA from this Court, which recognized that reasonable jurists could indeed debate most of these issues. This Court granted a COA regarding (1) whether the "official act" instructions were error under *McDonnell*; (2) whether that instructional error, if any, was harmless; and (3) whether the error in excluding the ethics report was still harmless when combined with any "official acts" instructional error. (3/27/19 Opinion at 6.) The Court denied a COA on whether the prejudicial effect of any instructional error spilled over to Dimora's convictions for mail and wire fraud or his convictions under § 666. (*Id.*) As will be shown, however, this Court retains the authority to consider these issues as well.

Dimora now appeals the district court's denial of his § 2255 motion to vacate his convictions. He seeks a new trial where the jury can for the first time fairly assess whether he had criminal intent and whether he committed crimes.

SUMMARY OF ARGUMENT

Dimora is entitled to a new trial. The two errors that occurred here go to the essence of the Government's case against him. First, this Court has already held that the exclusion of the ethics reports as hearsay was error. The district court's additional claim (not even suggested by the Government) that the reports are also inadmissible under Rule 403 as "confusing" and "prejudicial" is meritless. The ethics reports were promised to the jury, were critical to Dimora's defense, and do not add any confusion whatsoever. To the contrary, they add the truth that he was not hiding his relationships. Second, under *McDonnell*, we now know that the "official acts" instruction was error, as the jury was told it could convict for conduct that was not unlawful, such as setting up meetings, writing letters, and making phone calls or introductions. These errors mean that the jury improperly assessed both the front and back ends of the alleged "schemes" for which Dimora was convicted, resulting in cumulative prejudice and a "substantial and injurious effect" on the verdict, as the jury was able to convict him without determining that he had criminal intent to do criminal acts. It was already a close call (2-1) with the first error, and the majority's harmless-error analysis improperly relied on evidence under the definition of "official acts" that *McDonnell* has since repudiated. None of the convictions can stand. A new trial is required.

ARGUMENT

I. As this Court has held, the exclusion of the ethics reports was error.

A. There is no justification to exclude the ethics reports from the jury.

This Court unanimously concluded that the exclusion of Dimora's ethics reports on hearsay grounds at trial was error. *United States v. Dimora*, 750 F.3d 619, 628, 633 (6th Cir. 2014). And contrary to the district court's view, Federal Rule of Evidence 403 cannot be invoked to justify their exclusion. (Recall that the district court added this Rule 403 justification for exclusion *after* trial, even though neither party had ever suggested it applied.)

Under Rule 403, a court may exclude relevant evidence only if its probative value is "substantially outweighed" by the danger of unfair prejudice or confusion of the issues. Fed. R. Evid. 403. Nothing about this rule applies here.

First, everyone knew that the ethics reports were highly probative—they were at the heart of Dimora's defense that he did not secretly obtain things of value and therefore lacked criminal intent. Even the district court recognized earlier in the trial proceedings that key to the Government's case was showing that Dimora did not disclose his receipt of things of value. (*See* R. 1021, Tr. Vol. 14 at 3614, PageID#25284 ("[I]t's important I understand the government's case to be able to indicate there wasn't any disclosure.").) And this explains why the Government

"fought tooth and nail, in sidebar and outside the jury's presence, to keep these ethics reports out of the evidence." *Dimora*, 750 F.3d at 633 (Merritt, J., dissenting). Yet when later justifying the exclusion of this "important" evidence, the district court said it was of "limited probative value." (R. 930, Mem. Op & Order at 43, PageID#18913.) The district court claimed that the ethics reports would not add much for the jury because the evidence had shown that Dimora was "often seen in public dining with contractors seeking county work." (*Id.*) But being seen in public dining with contractors doesn't tell anyone anything about whether an official is receiving gifts and disclosing them as required by law. There is no basis for the district court's conclusion that the ethics reports had "limited" probative value. *See, e.g.*, *Doe v. Claiborne Cnty.*, 103 F.3d 495, 515 (6th Cir. 1996) (finding an abuse of discretion where "the court's ruling indicates that it may not have appreciated the nature of the evidence and the purpose for which plaintiff was offering it"); *United States v. Lueben*, 812 F.2d 179, 184 (5th Cir. 1987) (amended on other grounds) ("We hold that the district court abused its discretion in this case because it allowed the government to offer evidence on the issue of materiality but not the defense.").

Additionally, there was no danger of confusion or unfair prejudice. The only confusion and unfair prejudice was that arising from the district court improperly

excluding this probative evidence that the jury was told it would see. To support the alleged "prejudice" and "confusion," the district court pointed to two preprinted portions of the ethics report form: an explanation that disclosure "increases public awareness of potential conflicts and reassures Ohio citizens in the integrity of government," and a statement that the forms are signed under penalty of perjury. (R. 930, Mem. Op & Order at 43, PageID#18913; *see, e.g.*, R. 940-2, Dimora Ethics Reports at 146, 158, PageID#19164, 19176.) The court also said that evidence the Government might present in response could be "confusing." (*Id.* at 41–42, PageID #18911–12.) But those preprinted statements only further add *clarity* to the nature of the forms—they would have been helpful to the jury's understanding. Similarly, neither party had expressed any concerns about potential confusion before trial when the district court had ruled that Dimora could introduce the reports and the Government could respond with evidence "regarding the purpose of the ethics reports and also other factual matters related to the ethics reports." (R. 1010, Tr. Vol. 4 at 890, PageID#22266.) Finally, admission of the reports would prejudice the Government only insofar as they contradicted the Government's theory of prosecution: that Dimora "secretly" received things of value because they were "bribes" in return for which he provided official actions. Rebutting one party's theory of the case is not *unfair* prejudice; it's what it means

to have a fair trial. In any event, any purported concerns or "confusion" about the reports could have been addressed by limiting instructions or redaction. *See United States v. Whitmore*, 359 F.3d 609, 621 (D.C. Cir. 2004) (finding an abuse of discretion where the district court "could have adequately guarded against any risk of unfair prejudice or undue delay" by limiting cross-examination, giving limiting instructions, or setting reasonable limits on responsive evidence).

In short, the district court's post-trial, sua sponte effort to justify the exclusion of the ethics reports has no basis in law. Excluding the reports was error.

B. The majority's earlier harmless-error analysis relied on evidence of Dimora's "official acts."

This Court split 2-1 regarding whether the error in excluding the ethics report (standing alone) was harmless. Judge Merritt explained why it was not harmless, noting that "the subjective intent of the public official receiving the money is perhaps the last and only distinguishing feature between criminal '*quid pro quo* bribery' and permissible 'ingratiation.'" *Dimora*, 750 F.3d at 632 (Merritt, J., dissenting). And, because these ethics reports were so central to establishing that Dimora lacked criminal intent when receiving things of value, the error in excluding them "could well have influenced the jury's view of the case." *Id.*

Yet the majority believed these points were not strong enough to tip the scales into prejudicial error, relying on what it believed was overwhelming evidence

that Dimora had traded "official acts" for the things of value received. As noted, the majority stated that the "relevant crimes required a *quid pro quo* arrangement—accepting money or other things of value in exchange for ***official acts***." *Id.* at 629 (emphasis added). The majority similarly noted that the alleged bribers admitted to their "*quid pro quo* arrangements with Dimora" and that there was circumstantial evidence connecting the alleged bribes to the "*favors doled out*." *Id.* at 628–29 (emphasis added). Thus, this analysis could not stand if the definition of "official acts" was overbroad and erroneously included lawful conduct. As shown below, the Supreme Court in *McDonnell* held that the instruction was wrong in precisely this way.

II. Under *McDonnell*, the "official acts" instruction was error.

The Supreme Court in *McDonnell* held that an official act "must involve a formal exercise of governmental power that is similar in nature to a lawsuit before a court, a determination before an agency, or a hearing before a committee." 136 S. Ct. at 2372. It must be "something specific and focused that is 'pending' or 'may by law be brought' before a public official." *Id.* It can also occur if the official's conduct crosses the line from "expressing support" to "exerting pressure" on another official or providing advice with the intent that such advice forms the basis

for an "official act." *Id.* at 2371. "Setting up a meeting, talking to another official, or organizing an event (or agreeing to do so)—without more—does not fit the definition of 'official act.'" *Id.* at 2372. Because the jury instructions there enabled the jury to conclude that such conduct amounted to an official act, the jury could have convicted McDonnell for engaging in lawful conduct. *Id.* at 2374. The Court vacated the convictions, explaining that a new trial was required regardless of any other evidence that showed McDonnell had actually engaged in the true official acts.

The same error occurred here. Like *McDonnell*, the district court used the statutory definition of "official action" and, over defense objection, further defined the term to "include the decisions or actions generally expected of the public official" and "informal official influence." (R. 735-1, Jury Instr. at 24, PageID#16989.) And there was no instruction explaining *McDonnell*'s required distinction between permissible "expressing support" and impermissible efforts to "exert pressure" on another official. The district court's view that the appropriate line defining "official acts" is the line between conduct done in a "personal" versus "official" capacity is contrary to *McDonnell*'s holding, as is the district court's remark that jurors could "disregard" evidence later deemed unofficial under *McDonnell*. Simply put, just as in *McDonnell*, the jury was able to convict

Dimora of conduct that is not unlawful. Indeed, the Government repeatedly told the jury in closing argument that it should do exactly that, stating that "anything" Dimora did as Commissioner was an "official act," including merely setting up meetings, writing letters, and directing staff. Accordingly, just as in *McDonnell*, this error requires vacating Dimora's bribery convictions. *See United States v. Silver*, 864 F.3d 102 (2d Cir. 2017) (vacating bribery convictions because of overbroad "official acts" instruction, regardless of evidence presented against the defendant that would qualify under a proper definition); *United States v. Skelos*, 707 F. App'x 733 (2d Cir. 2017) (same); *United States v. Fattah*, 902 F.3d 197 (3d Cir. 2018) (same).

But the harm here was even greater than in *McDonnell* because, as discussed below, there is cumulative prejudice from this error when combined with the error in excluding the ethics report. As will be shown, none of Dimora's convictions are lawful.

III. The combined effect of these errors is not harmless.

A. Convictions must be vacated when an error had a "substantial influence" on the verdict, even in cases where there is evidence to support the jury's result.

A habeas court reviewing a preserved jury-instruction error "should apply the 'harmless error' standard that the [U.S. Supreme] Court had previously enunciated in *Kotteakos v. United States*, 328 U.S. 750 (1946), namely, 'whether the error had substantial and injurious effect or influence in determining the jury's verdict.'" *California v. Roy*, 519 U.S. 2, 5 (1996) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)). "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error." *Kotteakos*, 328 U.S. at 765. "It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand." *Id.* An error need not have more likely than not altered the verdict to have "substantial and injurious effect or influence." *See id.* at 776 ("That a conviction would, or might probably, have resulted in a properly conducted trial is not the criterion of [the harmless-error standard]."); *see also United States v. Dominguez-Benitez*, 542 U.S. 74, 86 (2004) (Scalia, J., concurring) (explaining that the *Kotteakos* standard is more defendant-friendly than both the "reasonable probability" standard and the "more likely than not" standard).

And where the "the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected," the verdict is "to be set aside." *United States v. Palazzolo*, 71 F.3d 1233, 1236 (6th Cir. 1995) (quoting *Yates v. United States*, 354 U.S. 298, 312 (1957)).

This point is illustrated by all of the cases in which courts vacate convictions for public-corruption charges where, as here, the jury was improperly given an overly broad instruction regarding "official acts." Courts uniformly hold that, where there is evidence of *both* unofficial and official acts under such an instruction, the convictions must be vacated regardless of the weight of the evidence that can establish true official acts. *See United States v. Silver*, 864 F.3d 102 (2d Cir. 2017); *United States v. Skelos*, 707 F. App'x 733 (2d Cir. 2017); *United States v. Fattah*, 902 F.3d 197 (3d Cir. 2018). Why must the convictions be vacated? Because, as the Supreme Court explained in *McDonnell*, the jury could have convicted the defendant "for conduct that is not unlawful," such as merely arranging meetings—and there is no way to know that the jury didn't simply stop deliberations after finding "guilt" on that basis. 136 S. Ct. at 2375; *see also, e.g., Fattah*, 902 F.3d at 239 ("Without the benefit of principles laid down in *McDonnell*, the jury was free to conclude that arranging the meeting was an official act—and it may have done so."). No court—other than the district court here—has said that a jury would

have "disregarded" the conduct that did not qualify as official acts when the jury was explicitly instructed that the conduct did qualify.

Finally, cumulative error can require reversal—and amount to a denial of due process—even if a single error viewed in isolation appears harmless. *Campbell v. United States*, 364 F.3d 727, 736 (6th Cir. 2004) ("We acknowledge that trial-level errors that would be considered harmless when viewed in isolation of each other might, when considered cumulatively, require reversal of a conviction."); *United States v. Parker*, 997 F.2d 219, 221 (6th Cir. 1993) ("Taken in isolation, these errors may be considered harmless . . . . After examining them together, however, we are left with the distinct impression that the due process was not satisfied in this case."); *Walker v. Engle*, 703 F.2d 959, 962–63 (6th Cir. 1983) (errors that may be deemed harmless if standing alone may cumulatively amount to a denial of due process).

Application of these principles shows Dimora's convictions cannot stand.

B. Dimora's convictions cannot stand because the errors had a "substantial influence" on the jury, which was able to convict Dimora of lawful conduct and without properly determining if he acted with criminal intent.

As a threshold matter, there is no doubt about this Court's authority to consider the substantial and injurious effect of these errors on all of Dimora's convictions. First, the COA grant authorizes the Court to consider the cumulative

prejudice regarding the instructional error along with the ethics-report error, which goes to Dimora's lack of criminal intent and affects the convictions on all counts. (3/27/19 Op. at 6 (granting COA regarding "whether the error in excluding the ethics report was still harmless when combined with any 'official acts' instructional error").) Second, this Court always retains the power to expand the COA issued by the motions panel, including when considering and issuing its decision on the merits. *See Kraus v. Taylor*, 715 F.3d 589, 594 (6th Cir. 2013) (court can expand earlier COA, which is an interlocutory order "subject to revision"); *see also, e.g., Villot v. Varner*, 373 F.3d 327, 337 n.13 (3d Cir. 2004) ("[T]he merits panel may expand the scope of the COA beyond the scope announced by the motions panel."); *United States v. Morgan*, 244 F.3d 674, 675 (8th Cir. 2001) (same); *Hiivala v. Wood*, 195 F.3d 1098, 1103 (9th Cir. 1999) (same).

The prejudicial effect of excluding the ethics report was by itself a 2-1 close call for this Court, with the panel members disagreeing about whether the jury could fairly assess Dimora's criminal intent when the ethics reports could have shown that he did not "secretly" accept things of value. And the majority believed the error was harmless in light of what it said was "overwhelming evidence" of the *quid pro quo* arrangements and the favors "doled out." But that evidence includes all the conduct that was incorrectly considered as "official acts" when it actually

was not, as *McDonnell* has shown. Thus, we now know the majority's harmless-error analysis was flawed. Accordingly, the same reasons Judge Merritt concluded that the ethics-report error was prejudicial in dissent before are even more compelling now. The key question, he emphasized, is whether the jury could assess Dimora's subjective intent. *Dimora*, 750 F.3d at 632 (Merritt, J., dissenting). As Judge Merritt explained, the district court had assured Dimora that he could present the ethics reports to the jury to rebut the Government's claim of "secret schemes" establishing criminal intent, and Dimora assured the jury he would do so. But when the report was excluded, Dimora lost credibility with the jury, lost his main evidence to show a lack of criminal intent, and lost the ability to distinguish himself from Russo—the main witness against him who pleaded guilty to similar charges but who, unlike Dimora, did not disclose receipt of things of value. And because the Government told the jury that the essence of the case was that Dimora had criminal intent to secretly obtain things of value in exchange for "official acts" and further told the jury it could find criminal intent for conduct that is *not* an official act, we now can have no confidence that the jury found criminal intent at all. This requires vacating all convictions—on both (1) the bribery counts, and (2) the remaining counts—as discussed in detail below.

1. The bribery convictions require a new trial.

First, consider the bribery convictions (Hobbs Act, honest-services mail & wire fraud, and section 666 bribery concerning programs receiving federal funds). The "official acts" instructional error alone requires vacating them all. The following image is an excerpt of the jury instructions, stating that the jury "must apply these principles"—including the overbroad "official act" definition appearing two pages later in the instructions—to all the bribery counts:

LAW OF BRIBERY AND KICKBACKS

Many of the Counts charged against both defendant Dimora and defendant Gabor involve alleged bribery or kickbacks. I will now instruct you on some of the general principles of bribery and kickbacks law. You must apply these principles when you consider the following crimes:

(1) Bribery Concerning Programs Receiving Federal Funds;

(2) Conspiracy to Commit Bribery Concerning Programs Receiving Federal Funds;

(3) Hobbs Act Extortion;

(4) Conspiracy to Commit Hobbs Act Extortion

(5) Conspiracy to Commit Honest Services Wire Fraud;

(6) Honest Services Mail Fraud; and

(7) Conspiracy to Commit Honest Services Mail Fraud.

Bribery and kickbacks involve the exchange of a thing or things of value for official action by a public official, in other words, a *quid pro quo* (a Latin phrase meaning "this for that" or "these for those"). Bribery and kickbacks also include offers and solicitations of things

(Jury Instr., R. 735-1 at 21, PageID#16988 (red underlines added for emphasis); *id.* at 23–24 (overbroad definitions of "official act" and "official action" are among "these principles" the jury "must apply" to all bribery counts).

And the Government repeatedly—and we now know, wrongfully—told the jury that "anything" Dimora did as Commissioner was an official act. (*See, e.g.*, R. 1046, Tr. Vol. 37 at 8317, PageID#30473 ("So, again, official acts. It's anything that a commissioner can do, anything an auditor can do because they're a commissioner. It doesn't have to be actually influencing a staff or changing someone's mind. It doesn't have to be bad for the county. It's anything a commissioner can do.").) The Government tied its argument to specific counts against Dimora, repeatedly urging the jury to convict him for conduct that was not an official act, including the following:

- Have his assistant schedule a judges' meeting (Counts 2 & 3);[1]
- Attend the meeting and speak highly of Alternatives Agency (Counts 2 & 3);[2]
- Call First Energy for a businessman ("Commissioners make calls to business people. It's part of their job duties.") (Counts 4 & 7);[3]
- Call a staff person to "look into" grant funding (Counts 4, 5 & 7);[4]

[1] R. 1045, Tr. Vol. 26 at 7997, PageID#30153.
[2] *Id.*
[3] R. 1046, Tr. Vol. 37 at 8326, PageID#30482.
[4] R. 1045, Tr. Vol. 36 at 8003, 8012, PageID#30159, 30168.

- Call a staff person to inquire about the status of bids (Counts 4, 6 & 7);[5]
- Tell staff to pick up a resume from an office fax machine and put it in a folder ("Directing your staff is something a commissioner does. That's an official act.") (Count 9);[6]
- Write a letter to a senator on county letterhead (Count 11);[7]
- Write a letter of recommendation on county letterhead (Counts 12 & 13);[8]
- Call a staff person for information ("And capacity as a commissioner, you get information. That's sufficient as a matter of law.") (Counts 12 & 13);[9]
- Call a local mayor to ask him to meet with a businessman (Counts 14, 15 & 16);[10]
- Call a staff person to set up a meeting with a businessman regarding a loan extension (Counts 17, 18, & 20);[11]
- Call a staff person to set up a meeting and attend a meeting with a businessman regarding building products (Counts 17, 19, 20 & 21);[12]

[5] *Id.* at 8003, PageID#30159.
[6] *Id.* at 8030, PageID#30186.
[7] *Id.* at 8033, PageID#30189.
[8] *Id.* at 8037, PageID#30193.
[9] R. 1046, Tr. Vol. 37 at 8393, PageID#30554.
[10] *Id.* at 8375, PageID#30531.
[11] R. 1045, Tr. Vol. 36 at 8051, PageID#30207.
[12] *Id.*

- "[D]irect[] his staff, including Renee Strong, to set up some of these dinners and meetings" (Counts 17–21);[13]
- Direct his staff to call a sewer-district official (Counts 26 & 27);[14]
- Ask the sewer-district official to meet with a local businessman (Counts 26 & 27);[15]
- Direct his staff to schedule a meeting and attend the meeting with a local mayor (Counts 26 & 27);[16] and
- Direct staff to get a sewer-district official's phone number (Counts 26 & 27).[17]

This violates *McDonnell*. The overly broad "official acts" instruction requires vacating the bribery convictions, regardless of any evidence the Government says qualifies under an appropriately narrow definition of "official acts." Once the Government told Dimora's jury it could make the link to meetings, phone calls, and the like—which were undisputed—the jury could then convict Dimora for that lawful conduct and stop there. Courts uniformly recognize this error requires vacating the convictions. *See United States v. Silver*, 864 F.3d 102 (2d Cir. 2017) (vacating convictions because of overbroad "official acts" instruction where defendant former Speaker of New York Assembly received

[13] *Id.*
[14] R. 1046, Tr. Vol. 37 at 8364, PageID#30520.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 8365, PageID#30521.

$835,000 in exchange for votes, acquisition of permits and jobs, and meetings with lobbyists regarding legislation); *United States v. Skelos*, 707 F. App'x 733 (2d Cir. 2017) (vacating convictions because of overbroad "official acts" instruction where defendant Majority Leader of the New York State Senate received $300,000 in exchange for influencing legislation and awarding government contracts); *United States v. Fattah*, 902 F.3d 197 (3d Cir. 2018) (vacating convictions because of overbroad "official acts" instruction where defendant Congressman received money in exchange for hiring a congressional staffer and assisted with obtaining an ambassadorship).

The court's reasoning in *Fattah* is particularly instructive, stressing the need for the jury—in light of the Supreme Court's decision in *McDonnell*—to be properly instructed on the difference between permissible attempts to "express support" and impermissible attempts "to pressure or advise another official on a pending matter." *Fattah*, 902 F.3d at 241. In *Fattah*, the government alleged that a businessman gave Congressman Fattah money in exchange for Fattah's efforts to obtain an ambassadorship for the businessman through various emails, letters, and a phone call. *Id.* at 240. The jury convicted Fattah of bribery, and the Third Circuit unanimously reversed due to an erroneous "official act" instruction. *Id.* at 241. The court explained that "the jury was not instructed that they had to place

Fattah's efforts on one side or the other of this divide" (between permissible expressing support and impermissible attempts to pressure). *Id.* "The jury might even have thought they were permitted to find Fattah's efforts—three emails, two letters, and one phone call—to themselves be official acts, rather than a 'decision' or 'action' on the properly identified matter of appointment." *Id.* "Such a decision," the court held, "would have been contrary to the dictates of *McDonnell*." *Id.* The court emphasized that because it was possible that the jury convicted for lawful conduct, the conviction was not valid: "Faced with such uncertainty, we cannot assume the jury verdict was proper." *Id.* "Although the jury *might* not have concluded that Fattah's efforts were themselves official acts, and although the jury *might* not have concluded that those efforts crossed the line into impermissible attempts to 'pressure or advise,' we are unable to conclude that the jury *necessarily* did so." *Id.* (court's emphasis). Thus, the court vacated the convictions and explained that the government could elect to retry these counts under proper instructions requiring the jury to determine whether Fattah's actions were "permissible attempts to express support, or impermissible attempts to pressure or advise another official on a pending matter." *Id.*

This same is true here. Dimora's jury was also never instructed to make this distinction. Thus, Dimora's jury could have convicted Dimora of permissible

efforts to express support—i.e., lawful conduct. And the distinction is particularly important here, because Dimora's actions as Chair of the County Democratic Party (and not Commissioner) do not count as official acts. In this regard, the jury had to determine whether Dimora impermissibly attempted to pressure or advise another official and whether he did so in his capacity as Commissioner or as Chair of the Democratic Party. The jury was never given the tools to make these distinctions. Reversal is required for all bribery convictions.

A separate note about the § 666 bribery convictions (concerning programs receiving federal funds) should be emphasized here. Courts hold that when the overbroad "official act" instruction is given on § 666 counts, the convictions are invalidated, just like those for Hobbs Act and honest-services violations. *See Skelos*, 707 F. App'x at 737. By contrast, when the instruction is not tied to the § 666 counts, courts have held there is no error. *See United States v. Porter*, 886 F.3d 562, 565 (6th Cir. 2018). Here, as noted, the jury was expressly told that the "official acts" instruction applied to all the bribery counts, including the § 666 counts—a point the Government concedes. (Jury Instr., R. 735-1 at 21, PageID#16988; Gov't Opp. to § 2255, R. 1182 at 33 n.8, PageID#32689.) Indeed, it is the first crime listed in the instruction reproduced on Page 46 of this Brief requiring application of the overbroad "official acts" principle. To the extent this Court did not account

for this in its COA decision (see page 4 of that decision, stating that COA should not be granted in light of *Porter*), the Court can now do so. *See Kraus v. Taylor*, 715 F.3d 589, 594 (6th Cir. 2013) (court can expand earlier COA, which is an interlocutory order that is "subject to revision"). The § 666 convictions, like all the bribery convictions, should be vacated based on this instructional error.

Moreover, as noted, the prejudice is even greater in this case than in *McDonnell*, *Fattah, Skelos,* and *Silver* because the jury's assessment of Dimora's conduct and criminal intent was further tainted by the ethics-report error, which led them to believe he had indeed acted "secretly" when in fact he had disclosed receiving things of value. Judge Merritt recognized that this error alone was prejudicial, and now we know the majority's harmless-error analysis was flawed because it relied on evidence of "official acts" under the overly broad definition the Supreme Court's *McDonnell* decision has since repudiated. The cumulative prejudicial effect of these errors on the bribery convictions is now overwhelming. Thus, this Court should vacate all the bribery convictions—i.e., all direct and conspiracy convictions related to the Hobbs Act, 18 U.S.C. § 1951; honest services wire & mail fraud, 18 U.S.C. §§ 1341, 1346, 1349; and bribery regarding programs receiving federal funds, 18 U.S.C. § 666.

2. The remaining convictions require a new trial.

The remaining convictions should be vacated as well. Not only are they all related to the unlawful bribery convictions discussed above, they also required the jury to find criminal intent, which—as Judge Merritt explained even before the "official acts" error was known—was prejudiced by the exclusion of the ethics report. The cumulative errors, never considered together by this Court, enabled the jury to conclude that Dimora had criminal intent for conduct that is not criminal. This fundamental violation had a substantial and injurious effect on the jury's assessment of all remaining convictions: (1) the tax convictions depended entirely on the bribery convictions—if the things of value Dimora received were bribes, then he underreported his income and his tax returns were false; if not, then his tax returns were accurate, (*see* R. 1045, Tr. Vol. 36 at 8090–91, PageID #30246–47); (2) the RICO conviction requires a finding of criminal intent and a finding that Dimora committed an underlying offense, such as bribery—but the bribery convictions are invalid and therefore the jury could have improperly found a RICO violation without an underlying crime; (3) the traditional mail and wire fraud convictions involved the same sort of criminal intent as the bribery convictions, i.e., the failure to disclose material facts regarding the receipt of things of value—so the cumulative errors influenced the jury's assessment of criminal intent on these

convictions as well; and (4) the obstruction convictions require the jury to determine whether Dimora had criminal intent to obstruct or cover up the alleged crimes against him—and because the cumulative errors invalidate those underlying convictions for lack of criminal intent, the jury could very well have found that Dimora similarly lacked criminal intent to obstruct what may not have been criminal conduct in the first place.

* * *

In sum, the error in excluding the ethics reports enabled the jury to convict Dimora without being able to properly determine if he acted with criminal intent, and the error defining "official acts" enabled the jury to convict for conduct that is not criminal. It is irrelevant that there was evidence upon which the Government could support the jury's result. *See McDonnell*, 136 S. Ct. at 2375 (holding that convictions must be vacated in light of overbroad "official acts" error and that if there is sufficient evidence for a jury to convict, "his case may be set for a new trial"—if not, "the charges against him must be dismissed"). We can have no confidence that Jimmy Dimora's convictions and 28-year sentence are lawful. A new trial on a clean slate is required. *See United States v. Parker*, 997 F.2d 219, 221 (6th Cir. 1993) ("[W]e are left with the distinct impression that the due process was not satisfied in this case") (vacating convictions because of cumulative error).

CONCLUSION

This Court should reverse the district court and vacate Dimora's convictions, remanding for a new trial where a jury may fairly assess whether he had criminal intent and actually committed crimes.

Respectfully submitted,

/s/ David E. Mills

David E. Mills (OH 0075400)
THE MILLS LAW OFFICE LLC
1300 West Ninth Street, Suite 636
Cleveland, OH 44113
Tel. (216) 929-4747
Fax. (202) 379-1767
dm@MillsFederalAppeals.com

Philip S. Kushner (OH 0043858)
KUSHNER & HAMED CO., L.P.A.
One Cleveland Center
1375 East Ninth Street, Suite 1930
Cleveland, OH 44113
Tel. (216) 696-6700
Fax. (216) 696-6772
pkushner@kushnerhamed.com

Counsel for James C. Dimora

CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is written in a proportionately spaced, 14-point Equity Text A font, and contains 11,916 words, exclusive of the material not counted under Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

/s/ David E. Mills
David E. Mills

Counsel for James C. Dimora

CERTIFICATE OF SERVICE

I certify that on June 20, 2019, I filed the foregoing electronically with the Clerk of the United States Court of Appeals for the Sixth Circuit. The Court's ECF system will automatically generate and send by e-mail a Notice of Docket Activity to all registered attorneys currently participating in this case, constituting service on those attorneys.

/s/ David E. Mills
David E. Mills

Counsel for James C. Dimora

ADDENDUM:
DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

R.	Page ID	Description
1	1	Indictment
328	3051	Order granting motion to continue
444	9630	Third Superseding Indictment
735-1	16966	Jury Instructions
930	18871	Post-trial Opinion
940	18963	Sentencing Memorandum
940-2	19164	Ethics Reports
1010	22262	Trial Transcript, Vol. 4
1021	25143	Trial Transcript, Vol. 14
1024	25612	Trial Transcript, Vol. 15
1027	26415	Trial Transcript, Vol. 19
1037	28322	Trial Transcript, Vol. 24
1029	26874	Trial Transcript, Vol. 31
1030	27982	Trial Transcript, Vol. 32
1045	30127	Trial Transcript, Vol. 36
1046	30410	Trial Transcript, Vol. 37
1162-1	32282	2255 Memorandum
1182	32657	Gov't Opp. to 2255
1196	33154	Opinion denying 2255
1197	33196	2255 Judgment
1199	33201	Opinion denying COA
1200	33204	Notice of Appeal